



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2023-0013]

Hours of Service of Drivers: Application for Exemption; Matthew Killmer

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition; denial of application for exemption.

SUMMARY: FMCSA announces its decision to deny the application from Matthew Killmer requesting an exemption from the hours-of-service (HOS) regulations to allow him to split his sleeper berth time into two 5-hour periods. The applicant indicates that the exemption would enable him to be a more alert and well rested commercial motor vehicle (CMV) operator and allow him to find a safe place to park his vehicle. FMCSA analyzed the application and public comments and determined that the exemption is not likely to achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; FMCSA; 202-366-2722 or richard.clemente@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Viewing Comments and Documents

To view comments, go to www.regulations.gov, insert the docket number “FMCSA-2023-0013” in the keyword box, and click “Search.” Next, sort the results by “Posted (Newer-Older),” choose the first notice listed, and click “View Related Comments.”

To view documents mentioned in this notice as being available in the docket, go to www.regulations.gov, insert the docket number “FMCSA-2023-0013” in the keyword box, click “Search,” and chose the document to review.

If you do not have access to the internet, you may view the docket by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the *Federal Register* (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely maintain a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305(a)). The Agency must publish its decision in the *Federal Register* (49 CFR 381.315(b)). If granted, the notice will identify the regulatory provision from which the applicant will be exempt, the effective period, and all terms and conditions of the exemption (49 CFR 381.315(c)(1)). If the exemption is denied, the notice will explain the reason for the denial (49 CFR 381.315(c)(2)). The exemption may be renewed (49 CFR 381.300(b)).

III. Background

Current Regulatory Requirements

FMCSA's hours-of-service (HOS) regulations in 49 CFR part 395 limit the time CMV drivers may drive and also require certain off-duty periods to ensure that individuals stay awake and alert while driving. The HOS regulations in 49 CFR 395.3(a)(1) prohibit an individual from continuing to drive after 11 hours driving. Further, under 49 CFR 395.3(a)(2) drivers may not drive after a period of 14 consecutive hours on duty until they have been off duty for a minimum of 10 consecutive hours, or the equivalent of at least 10 consecutive hours off duty. Section 395.1(g)(1)(ii) allows a driver using the sleeper berth exception to accumulate the equivalent of at least 10 consecutive hours off duty by taking a combination of either two periods of sleeper-berth time or a combination of off-duty time and sleeper-berth time (in both cases totaling 10 hours) if: (1) neither rest period is shorter than 2 hours; (2) one rest period is at least 7 consecutive hours long; and (3) driving time before and after each rest period, when added together does not exceed 11 hours driving and does not violate the 14-hour duty-period limit.

Applicant's Request

Matthew Killmer requests an exemption from certain restrictions imposed by 49 CFR 395.1(g)(1)(ii) on the use of the sleeper berth to accumulate the required off-duty time under 49 CFR 395.3(a)(1). Section 395.1(g)(1)(ii), as described above, allows a driver operating a CMV equipped with a sleeper berth to obtain the required 10 hours of rest in two periods. In particular, the applicant requests that he, and other drivers who so request, be allowed to shorten the required 7-consecutive-hour sleeper-berth period to 5 hours, paired with another 5-hour sleeper-berth period, to accumulate the required 10 hours of rest.

IV. Method to Ensure an Equivalent or Greater Level of Safety

The applicant believes that the exemption, if granted, would result in increased driver turnover at rest areas/safe havens, which would allow more drivers to utilize

available parking spaces to get adequate rest. He states that the percentage of drivers with proper rest would increase creating a more alert and responsive driver population and reducing sleep-related crashes/incidents. The applicant further adds that this would allow drivers to better utilize their available time when accounting for delays due to inclement weather or detention time at a shipper's facility.

V. Public Comments

On February 23, 2023, FMCSA published Matthew Killmer's application and requested public comment (88 FR 11504). The Agency received 279 comments, nearly all filed by individuals/owner-operators and small trucking companies. Comments supporting the application numbered 222, while 11 opposed the exemption and another 46 offered no position either for or against the request, but instead offered general comments on the current HOS regulations. Joint comments in opposition were filed by the Truck Safety Coalition (TSC), Citizens for Reliable and Safe Highways (CRASH), and Parents Against Tired Truckers (PATT). These three organizations stated that the law requires any exemption request to include "proven measures to ensure that an equal or greater level of safety will result from the granting of the exemption. . . . The applicant fails to propose any rigorous, evidence-based measures that would satisfy this statutory requirement." They added: "the reason that the current sleeper berth requirement exists is due to the fact that FMCSA found that splitting time in the sleeper berth in too short of increments prevents obtaining reasonable sleep that is necessary to perform a safety-sensitive function."

Other themes in opposition included: 1) there is not enough data available from the June 1, 2020, HOS rule changes to support a 5/5 sleeper berth split provision; 2) additional "flexibility" is not necessary with the current HOS regulations; 3) better driver training is needed; and 4) the increased numbers of CMV crashes/incidents.

A number of filers supporting the exemption argued that a 6/4 sleeper-berth split: 1) would provide a better opportunity for drivers to find safe parking and to stay more alert; 2) would provide a better opportunity for managing a driver's down time; 3) would enable drivers to be more rested; and 4) could be combined with additional ideas for "pausing" the 14-hour "driving window."

Those with no position either for or against the exemption had general complaints about the HOS rules, with including: 1) the Agency again needs to amend/revise the HOS rules; 2) accidents/incidents are caused by driver carelessness not [HOS] laws; 3) let drivers decide when they are tired; 4) support for a 24-hour restart instead of the current 34-hour restart; and 5) the Agency should grant exemptions to companies with better Pre-Employment Screening Program (PSP) scores.

VI. FMCSA Safety Analysis and Decision

FMCSA has evaluated Matthew Killmer's application and public comments and denies the exemption request. The applicant failed to establish that he would likely maintain a level of safety equivalent to, or greater than, the level achieved without the exemption.

In 2020, in its most recent HOS rulemaking, the Agency modified the split sleeper-berth provisions to provide more flexibility for drivers and settled on the current rule which requires at least one longer period of at least 7 hours in the sleeper berth (85 FR 33396). During the rulemaking process, in considering other split modifications, the Agency stated:

[T]here is no clear evidence—to say nothing of a scientific consensus—that a 6-hour (or shorter) sleeper-berth period is long enough to prevent cumulative fatigue. That is especially obvious since drivers cannot be expected to fall asleep immediately. The 7-hour period adopted in this final rule allows enough time for drivers to relax, de-compress, and obtain more than 6 hours of sleep. Having examined a wide range of sleep and fatigue studies, which fail to converge on a single result, the Agency has concluded that the proposed 7/3 split is both scientifically reasonable and responsive to the needs of the driver population for greater flexibility.

Although a large number of commenters supported Mr. Killmer's request, they did not provide any evidence to demonstrate that the exemption was likely to provide a level of safety equivalent to the current regulatory requirements. The Agency acknowledges the commenters' concerns relating to truck parking; however, those concerns are not a valid basis for evaluating the application, as the Agency must base its decision on the requirement for an equivalent level of safety.

For the above reasons, the exemption application is denied.

Earl Stanley Adams Jr.,

Deputy Administrator.

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